IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

BOBBY TORRY,

Plaintiff,

v.

SEAN SALTER,

Defendant.

OPINION and ORDER

10-cv-378-slc

On February 9, 2011, this court granted plaintiff leave to proceed *in forma pauperis* on his Fourteenth Amendment due process claim that defendant Sean Salter was not an impartial decision maker at his disciplinary hearing. On May 11, 2011, the parties consented to my jurisdiction pursuant to 28 U.S.C. § 636(c)(1).

Defendant has moved for summary judgment on the ground that plaintiff failed to exhaust his administrative remedies on his claim. I am granting defendant's motion for summary judgment and dismiss plaintiff's claim without prejudice because he has failed to exhaust his administrative remedies.

UNDISPUTED FACTS

On May 15, 2006, while incarcerated at the Columbia Correctional Institution, plaintiff Bobbie Torry submitted Offender Complaint CCI-2005-12915, alleging that Salter was not an impartial decision maker at his disciplinary hearing on conduct report number 1515365. On May 25, 2006, inmate complaint examiner Burt Tamminga recommended dismissing Torry's complaint, finding that Salter did not have substantial involvement in the incident, which was the basis of the conduct report, prior to serving as the disciplinary hearing officer.

On June 5, 2006, Warden Gregory Grams (the "reviewing authority" for Torry's complaint) accepted Tamminga's recommendation and dismissed Torry's complaint. Under the applicable regulation, Torry had ten calendar days to file his appeal of this decision.

Torry filed an appeal with the Corrections Complaint Examiner on June 12, 2006, but it was returned to him on June 13, 2006 because he had not listed the complaint number on the form. On June 27, 2006, the Corrections Complaint Examiner's Office received Torry's appeal with a complaint number listed on it. That same day Corrections Complaint Examiner John Ray recommended dismissing Torry's appeal as untimely and advised Torry that filing the first incomplete appeal did not toll the 10 day filing period.

On June 28, 2006, Rick Raemisch, the secretary of the Department of Corrections accepted the recommendation of the Corrections Complaint Examiner and dismissed Torry's complaint.

OPINION

Under 42 U.S.C. § 1997e(a), a prisoner must exhaust all available administrative remedies before filing a lawsuit in federal court. *Dixon v. Page*, 291 F.3d 485, 488 (7th Cir. 2002). This means that the prisoner must "properly take each step within the administrative process,"[1] which includes following instructions for filing the initial grievance,[2] as well as filing all necessary appeals,[3] "in the place, and at the time, the prison's administrative rules require."[4]

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[1] *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002)

[2] *Cannon v. Washington*, 418 F.3d 714, 718 (7th Cir. 2005)

[3] *Burrell v. Powers*, 431 F.3d 282, 284-85 (7th Cir. 2005)

[4] *Pozo*, 286 F.3d at 1025

In other words,

> This circuit has taken a strict compliance approach to exhaustion. A prisoner must properly use the prison's grievance process. If he or she fails to do so, the prison administrative authority can refuse to hear the case, and the prisoner's claim can be indefinitely unexhausted.

Dole v. Chandler, 438 F.3d 804, 809 (7th Cir. 2006). That said, prison officials cannot take unfair advantage of the exhaustion requirement, for instance, by failing to respond to properly filed grievances, or failing to provide forms necessary to file a grievance. *Kaba v. Stepp*, 458 F.3d 678, 685 (7th Cir. 2006).

Thus, if prison officials reject a grievance for failing to comply with a procedural requirement and decline to address the merits of the grievance, the general rule is that the prisoner has not exhausted his administrative remedies and any lawsuit the prisoner later files must be dismissed. *See. Dixon*, 291 F.3d 485 (prisoner did not exhaust when, after he did not receive relief he was promised, he did not appeal to next level of review); *Lewis v. Washington*, 300 F.3d 829 (7th Cir. 2002) (prison officials failure to respond to prisoner's previous grievances did not exempt him from having to appeal the grievance they did respond to); *Pozo*, 286 F.3d at 1025. In determining whether a plaintiff exhausted his available administrative remedies, defendants have the burden to prove that the plaintiff failed to comply with § 1997e(a). *Jones v. Bock*, 549 U.S. 199 (2007).

Wisconsin inmates have access to an administrative grievance system governed by the procedures set out in Wis. Admin. Code §§ DOC 310.01- 310.18. Under these provisions, prisoners start the complaint process by filing an inmate complaint with the institution complaint examiner. An institution complaint examiner may investigate inmate complaints,

reject them for failure to meet filing requirements or recommend to the appropriate reviewing authority (the warden or designee)that the complaint be granted or dismissed. Wis. Admin. Code § DOC 310.07(2). If the institution complaint examiner recommends that the complaint be granted or dismissed on its merits, then the appropriate reviewing authority may grant, dismiss, or return the complaint for further investigation. Wis. Admin. Code § DOC 310.12.

If an inmate disagrees with the decision of the reviewing authority, then he has just ten calendar days within which to appeal that decision to a corrections complaint examiner, who is to conduct additional investigation (when appropriate) and make a recommendation to the Secretary of the Wisconsin Department of Corrections. Wis. Admin. Code § DOC 310.13. Within ten working days after receiving the corrections complaint examiner's recommendation, the Secretary must accept the recommendation in whole or with modifications, reject it and make a new decision, or return it for further investigation. Wis. Admin. Code § DOC 310.14.

In this case, Torry did appeal the June 5, 2006 decision of the reviewing authority to the Corrections Complaint Examiner on June 12, 2006 within the ten day time limit. However, on June 13, 2006 plaintiff was advised that the appeal was not filed because it did not comply with the requirement of listing the complaint number on the appeal. Although he had time to re-file his appeal within the 10 day period, he did not re-file his appeal until June 26, 2006 after the 10 day period had expired. Even assuming, for the sake of argument that Torry was entitled to restart his ten-day clock upon being notified of his appeal's procedural defect, *that* deadline would have run on Friday, June 23, 2006, three days before Torry actually refiled his appeal.

Torry has presented no evidence to dispute the time line of what happened. Instead, he argues that the appeal he filed on June 12 was timely. But the Corrections Complaint Examiner did not accept the appeal for filing because it was procedurally deficient. The CCE had the right to reject the application until it was completely filled out. It's like taking a check to a bank to cash, but there's no signature on the check, so the bank won't accept it: it's not enough just to show up at the correct location and hand the correct piece of paper to the correct person: the piece of paper also has to be filled out correctly or it doesn't count. And it's not up to the person presenting the check to tell the bank that its rules and procedures are stupid or unnecessary. As long as the rules are made clear, people dealing with the bank have to follow the rules or they won't get their checks cashed. So it is here: Torry presented the right piece of paper to the right authority, but he didn't provide all the information that he was supposed to. He had the added problem of a tight deadline, but he still had time to put the case number on his complaint and present it again before the ten days ran out. But he didn't do this, at least not in time. As a result, Torry did *not* appeal the decision of the reviewing authority to the Corrections Complaint Examiner within the ten day time limit.

Because Torry failed to properly exhaust his administrative remedies before he filed this federal lawsuit, the court must grant defendants' motion for summary judgment and dismiss his claim without prejudice. 42 U.S.C. § 1997e(a); *see also Ford v. Johnson*, 362 F.3d 395, 401 (7th Cir. 2004) (dismissal for failure to exhaust is always without prejudice).

ORDER

IT IS ORDERED that :

1. Defendant's motion for summary judgment, dkt. 23, is GRANTED.

2. Plaintiff's claim that defendant Salter violated his Fourteenth Amendment due process rights is DISMISSED without prejudice for plaintiff's failure to exhaust his administrative remedies.

Entered this day of 28th June, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge